

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BRUCE J. STANIFORTH, an individual
and as beneficiary of the Bruce J.
Staniforth IRA,

Plaintiff,

v.

TOTAL WEALTH MANAGEMENT,
INC., et al.,

Defendants.

Case No.: 14-cv-01899-GPC-JLB

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION TO STRIKE ANSWERS
AND ENTER DEFAULTS**

On January 13, 2022, Plaintiff Bruce J. Staniforth ("Plaintiff") filed a Motion to Strike Defendant's Answers and Enter Default. ECF No. 66. The Court set a briefing schedule allowing for responses and a reply. ECF No. 67. On February 1, 2022, Defendant Douglas David Shoemaker ("Douglas Shoemaker" or "Defendant Shoemaker") filed a response in opposition. ECF No. 70. No other defendants have responded to the pending Motion. Having considered the papers and the parties'

1 arguments, the Court finds this matter suitable for disposition without a hearing and
2 therefore VACATES the hearing previously set for February 25, 2022.

3 **I. BACKGROUND**

4 This case has been pending for many years, beginning with a Complaint filed on
5 August 13, 2014. The Complaint alleges, in short, that Defendants Total Wealth
6 Management, Inc., Altus Capital Management, LLC, Altus Capital Opportunity Fund,
7 LP, Capita Advisors, Inc., Financial Council, Inc., Pinnacle Wealth Group, Inc., and
8 individual defendants Jacob K. Cooper, Nathan McNamee, and Douglas Shoemaker,
9 defrauded Plaintiff of over \$900,000 through an investment advisory relationship in
10 violation of securities and investment management laws. ECF No. 1. Defendants Altus
11 Capital Management LLC, Altus Capital Opportunity Fund LP, Jacob K. Cooper, and
12 Total Wealth Management Inc. answered on November 25, 2014. ECF No. 24. Douglas
13 Shoemaker, appearing *pro se*, answered on February 5, 2015. This action was then stayed
14 on May 12, 2015 following the appointment of a receiver in the related action styled *SEC*
15 *v. Total Wealth Management, Inc., et al.*, Cas No. 15-cv-226-BAS-DHB (“the
16 Receivership Case”). ECF No. 43. During the stay, the Court ordered the parties to
17 provide joint status reports to update the Court. ECF Nos. 47, 49, 51, 53, 54, 56, 57. The
18 most recent joint status report as to that related action, submitted by the former Receiver
19 Thomas A. Seaman (“former receiver”) and Plaintiff, informed this Court that the former
20 receiver was discharged and released in the Receivership Case, therefore leaving no
21 receivership *res* against which the stay in the instant matter would apply. ECF No. 58.
22 This Court then lifted the stay in the instant matter and referred the matter to Magistrate
23 Judge Jill Burkhardt to determine further proceedings. ECF No. 59. On December 13,
24 2021, Plaintiff requested entry of default against Defendants Nathan McNamee and
25 Capita Advisors, Inc. for a failure to plead or otherwise defend in the action. ECF No. 61.
26 The Clerk duly entered default as to Capita Advisors, Inc. and Nathan McNamee on
27
28

December 14, 2021. ECF No. 64. Magistrate Judge Burkhardt held a telephonic Case Management Conference on January 21, 2022, at which only counsel for Plaintiff appeared. ECF No. 68. In light of the fact that none of the defendants or their counsel made appearances at this conference, the Magistrate Judge declined to issue a scheduling order. *Id.*

Plaintiff now moves to strike Defendants' answers and enter defaults against them, arguing that individual Defendants Jacob Cooper ("Cooper" or "Defendant Cooper") and Douglas Shoemaker have made no effort to defend themselves. ECF No. 66-1 at 2. Plaintiff further argues that corporate defendants Total Wealth Management, Inc., Altus Capital Management LLC, and Altus Capital Opportunity Fund LP (the "corporate Defendants") have not retained counsel to represent them, and thus their answers should be stricken and defaults entered against them as well. *Id.* Only Defendant Shoemaker responded, arguing that he was not aware that the stay had been lifted and that, contrary to Plaintiff's assertion, he did not persistently fail to defend himself. ECF No. 70 at 2. Neither the corporate Defendants nor Defendant Cooper filed a response.

II. DISCUSSION

Obtaining a default judgment is a two-step procedure. Federal Rule of Civil Procedure ("Rule") 55 provides that "when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend . . . the clerk must enter the party's default." Fed. R. Civ. P. 55(a). After the default is properly entered by the clerk, a party seeking relief other than for a sum certain must apply to the trial court for a default judgment. Fed. R. Civ. P. 55(b).

Where a defendant has filed an answer, as here, the Court cannot enter a default unless the Answer is first stricken. *Osgood v. Main Street Marketing, LLC*, No. 16cv2415-GPC (BGS), 2017 WL 3194460, at *2 (S.D. Cal. Jul. 27, 2017). A defendant's answer may be stricken when the defendant persistently fails to participate in the action.

1 *Microsoft Corp. v. Marturano*, No. 1:06cv1747 OWW GSA, 2009 WL 1530040, at *6
2 (E.D. Cal. May 27, 2009) (granting default against defendant because defendant failed to
3 keep court apprised of his address for five months, did not participate in the discovery
4 process, did not provide initial disclosures, and failed to attend a deposition and
5 settlement conference as ordered by the court). In addition, “when a corporation fails to
6 retain counsel to represent it in an action, its answer may be stricken and a default
7 judgment entered against it.” *Emp. Painters’ Tr. v. Ethan Enters., Inc.*, 480 F.3d 993 (9th
8 Cir. 2007); *see also* Civil Local Rule 83.3(j) (stating that corporations may appear in
9 court only through an attorney permitted to practice pursuant to Civil Local Rule 83.3).
10 Default is a permissible sanction for failure to comply with local rules requiring
11 representation by counsel. *Emp. Painters’ Tr.*, 480 F.3d at 998 (citing *United States v.*
12 *High Country Broad. Co., Inc.*, 3 F.3d 1244, 1245 (9th Cir. 1993)).

13 First, the Court turns to whether the corporate Defendants Total Wealth
14 Management, Altus Capital Management, and Altus Capital Opportunity Fund should
15 have their answer stricken and default entered against them for their failure to retain
16 counsel. All three corporate Defendants were previously represented by attorneys Alan
17 Sparer and Michael Gallo from the Sparer Law Group. However, as part of a motion filed
18 in 2015 to substitute new counsel for Sparer Law Group’s former client Defendant
19 Cooper, Sparer Law Group noted that following the appointment of the receiver in the
20 Receivership Case, “[c]ounsel for the receiver has taken over representation of those
21 entities [i.e. the corporate Defendants], and has taken the position that Sparer Law Group
22 no longer represents those entities and no substitution of attorneys need be filed with
23 respect to those entities.” ECF No. 40 at 2, fn. 1. Sparer Law Group thus acknowledged
24 that they no longer represented the corporate Defendants. Neither Sparer Law Group nor
25 any other counsel for the corporate Defendants has appeared since then before this Court.
26 Since the receivership has been discharged, counsel for the receiver does not represent
27
28

1 these Defendants either. Therefore, the Court concludes that the Defendants are currently
2 unrepresented by counsel. Furthermore, these Defendants have failed to participate in this
3 litigation beyond the initial filing of their answer, including by failing to appear at the
4 telephonic Case Management Conference set before Magistrate Judge Burkhardt on
5 January 21, 2022. The Court concludes that it is appropriate to strike the Answer filed by
6 Defendants Total Wealth Management, Inc., Altus Capital Management LP, and Altus
7 Capital Opportunity Fund LP. ECF No. 24. The Court thus ORDERS that this Answer be
8 stricken and GRANTS Plaintiff's motion to enter default.

9 Turning next to individual Defendant Jacob Cooper, the Court notes that Cooper
10 filed a joint answer with Altus Capital Management LLC, Altus Capital Opportunity
11 Fund LP, and Total Wealth Management Inc. in November of 2014. *Id.* He also
12 substituted counsel in 2015, replacing Sparer Law Group with attorney Vincent J. Brown.
13 ECF Nos. 40, 42. As Plaintiff points out, Cooper's counsel is currently listed as inactive
14 on the State Bar of California's website, and Cooper has made no other attempts to
15 appear before this Court or the Magistrate Judge since 2015, including his failure to
16 appear at the Case Management Conference before Magistrate Judge Burkhardt. Cooper
17 did not file a response to the instant motion for default. Given the length of time without
18 any activity from Cooper in this case, the Court concludes that Cooper has continually
19 failed to defend this action, and it does not appear that he will do so in future. The Court
20 therefore GRANTS Plaintiff's motion to strike Cooper's answer and enter default.

21 Finally, the Court considers whether Defendant Shoemaker has consistently failed
22 to defend himself such that his answer should be stricken and default entered.
23 Shoemaker, proceeding *pro se*, filed an answer to the Complaint on February 15, 2015.
24 ECF No. 234. He also failed to appear before Magistrate Judge Burkhardt at the Case
25 Management Conference on January 21, 2022. ECF No. 68. However, Shoemaker is the
26 only defendant who responded to Plaintiff's motion. ECF No. 70. In his response,
27
28

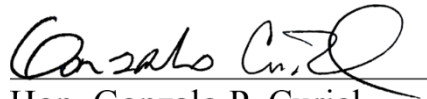
Shoemaker contests the characterization that he has failed to defend himself, and explains that he was unaware that the stay was lifted. *Id.* at 2. He also argues that Plaintiff provided only 24 hours of notice between Plaintiff's counsel's attempt to contact him and the filing of the instant motion. *Id.* The Court construes Shoemaker's *pro se* filing liberally. *United States v. Qazi*, 975 F.3d 989, 993 (9th Cir. 2020). Because Shoemaker has evinced his intent to participate in, and defend himself from, this case by filing a response to Plaintiff's motion for default, the Court concludes that at this time, striking Shoemaker's answer and entering default for a failure to defend would be unwarranted. The Court HEREBY DENIES Plaintiff's motion to strike and enter default as to Defendant Douglas Shoemaker.

III. CONCLUSION

In sum, the Court GRANTS the Motion to strike the answer of Defendants Total Wealth Management Inc., Altus Capital Management LLC, Altus Capital Opportunity Fund LP, and individual Defendant Jacob K. Cooper. The Clerk of Court is directed to enter default as to these Defendants. The Court HEREBY DENIES the motion to strike and enter default as to individual Defendant Douglas Shoemaker. The case is again referred to Magistrate Judge Burkhardt for a case management conference to be held as to Plaintiff and Defendant Shoemaker.

IT IS SO ORDERED.

Dated: February 17, 2022


Hon. Gonzalo P. Curiel
United States District Judge